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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 101

TILLIE BLUM,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT OF PETITION.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To: The Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above entitled case on February 9, 1951.

OPINION BELOW.

The opinion of the Tax Court of the United States (R. 55-60) is reported in 10 T. C. 1131. The opinion of the Court of Appeals (R. 75-80) is reported in 187 F. (2d) 177.

JURISDICTION.

The judgment of the Court of Appeals was entered on February 9, 1951 (R. 81). A timely petition for rehearing was denied March 21, 1951 (R. 95). The jurisdiction of this Court is invoked under Title 28 of the United States Code, Section 1254(1).

STATUTE INVOLVED.

The pertinent statutory provision, Section 22(k) of the Internal Revenue Code (26 U. S. C., 1946 ed., Sec. 22), is printed in the Appendix, *infra*, pp. 21, 22.

SUMMARY STATEMENT OF MATTERS INVOLVED.

Petitioner and Harry Blum were married in 1914, and at all times material hereto resided in Chicago, Illinois (R. 55). Harry Blum filed a bill for divorce in the Superior Court of Cook County, Illinois in 1932. The petitioner filed an answer and a cross-bill, praying for separate maintenance in January, 1933. On February 27, 1935, the petitioner and her former husband, Harry Blum, entered into a written agreement. The agreement states in part (R. 55):

> "*First.* This agreement is expressly declared by both parties to be effective only in the event that said Superior Court of Cook County, upon due and proper consideration of the cross-bill as finally amended, and the evidence adduced by both parties, shall enter a decree of divorce severing the bonds of matrimony existing between them. In the event that the said court, upon due and proper consideration of the said cross-bill as finally amended, and the evidence adduced by

the parties, shall not enter a decree of divorce so severing the bonds of matrimony between them, this agreement shall become and be null and void.

"*Second.* The said husband undertakes, promises and agrees to pay the said wife the sum of One Hundred Twenty Thousand Dollars ($120,000.00) in the manner following: the sum of Seventy-five Hundred Dollars ($7,500.00) on or before March first, A. D. 1936; a like sum of Seventy-five Hundred Dollars ($7,500.00) on or before the first day of March of each and every year thereafter for the next succeeding eight (8) years; with a final payment of Fifty-two Thousand Five Hundred Dollars ($52,500.00) on or before March first, 1945."

The agreement also provided that the husband was to pay interest at the rate of 5 per cent on the $120,000.00, and on any balance thereof remaining unpaid; and that the payments to the wife were to continue regardless of the death of either party, and regardless of the remarriage of the wife. The husband was to pledge security for the payment of the $120,000.00. The agreement was to be made a part of the divorce decree. The agreement contained other provisions in regard to the property of the parties not material hereto (R. 56).

Petitioner amended her cross-bill on March 1, 1935, praying for a divorce instead of separate maintenance (R. 55). A divorce was granted to the petitioner in that proceeding upon her amended cross-bill. The decree was entered of record on *March 2, 1935.* The decree has never been modified (R. 56).

The decree ordered that the parties "perform and carry out all the terms, provisions, conditions and obligations set forth in that certain settlement contract entered into between them on the 27th day of February, A. D. 1935 * * *" and that the "property settlement contract, by reference thereto, is made a part of this decree, with the same force and effect as if fully set out herein" (R. 25).

Petitioner's husband paid $120,000.00 to the petitioner, with interest, during the period from 1936 to March 1, 1945, at which date the final installment was paid (R. 56, 13).

The petitioner, in her income tax returns for the years 1942, 1943, and 1944, reported the interest received from her former husband (R. 57).[1]

Commissioner of Internal Revenue, in a notice of deficiency dated February 5, 1947, determined an income tax deficiency against petitioner of $9,602.51 for the taxable years 1943 (as associated with 1942) and 1944 (R. 5). The basis of the Commissioner's determination was that installment payments of the lump sum settlement should be included in petitioner's income for the years in question under Section 22(k) of the Internal Revenue Code.[2]

Petitioner contended before the Tax Court that the amounts (over and above interest payments) received from her divorced husband were installment payments of a lump sum settlement payable in a period of not more than ten years, and therefore were not taxable under Section 22(k). The Tax Court in 10 T. C. 1131, entered June 21, 1948, Judge Murdock speaking, upheld petitioner's position on the theory that the agreement of February 27, 1935 was conditioned upon the entry of the divorce decree and therefore no obligation to pay was imposed upon or incurred by petitioner's husband until entry of the decree on March 2, 1935 (R. 59, 60). Thus, the lump sum settlement was paid

1.

Year	Interest reported
1942	$3,097.42
1943	2,250.94
1944	1,759.98

2. The Commissioner held that the following amounts should be included in the petitioner's income under Section 22(k) (R. 57):

1942	$15,711.94
1943	10,423.67
1944	13,760.64

The explanation for the adjustment is given at pages 7 to 11 of the record.

and payable in a period of not more than ten years and therefore tax free to petitioner under Section 22(k).[3]

The Court of Appeals reversed the Tax Court on the ground that the obligation, being fully itemized in the agreement, was imposed by the agreement (R. 79-80).[4]

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3. Subsequently, in *Harry Blum* v. *Commissioner*, T. C. Memo, October 26, 1948, Docket No. 17541, the Tax Court held petitioner's husband could not deduct the installment payments paid petitioner under Section 23(u). The Tax Court reaffirmed the basis of its decision in petitioner's case in a well reasoned opinion.

4. The Court of Appeals had previously decided *Harry Blum* v. *Commissioner*, 177 F. (2d) 670, entered November 7, 1949. It there reversed the judgment of the Tax Court on two grounds:

(A) An obligation was imposed upon the parties on February 28, 1935, when the chancellor signed the decree, despite the fact the decree was entered on March 2, 1935.

(B) The obligation rests on the contract of February 27, 1935 for the reason given above.

In the instant case it was necessary for the Court to abandon the first reason because of a subsequent decision by the Illinois Supreme Court (*Freeport Motor Casualty Co.* v. *Tharp*, 406 Ill. 295, 94 N. E. (2d) 139), which held a decree was not effective until entered. This rule has long been recognized in Illinois as applicable to a *decree* in chancery. The rule in *People* v. *Jarecki*, 352 Ill. 307, 185 N. E. 570, 571, cited by the Court as controlling in *Harry Blum*, is applicable only to a *judgment* at law. In view of this it could not be denied by the Court below that under State law a divorce decree could be effective only when entered of record.

QUESTIONS PRESENTED.

I.

Did the Court of Appeals err when it held the ten-year period described in the exception clause of Code Section 22(k) begins to run on a date prior to the entry of a decree of divorce?

II.

Did the Court of Appeals err when it held that the ten-year period of Section 22(k) (which determines whether installment payments are "periodic" payments) begins to run prior to the imposition of an obligation upon the parties to a divorce?

III.

Did the Court of Appeals err when it held the general rule of law in *Harris* v. *Commissioner of Internal Revenue*, 340 U. S. 106, is not applicable to an income tax case?

IV.

Did the Court of Appeals err when it held that payments received by petitioner as installments of a principal sum were "periodic" payments under Section 22(k) and therefore taxable to petitioner?

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

I.

The Court of Appeals in the instant case is in conflict with the great body of law concerning Section 22(k) which has been developed since 1942 by the Tax Court and other Courts of Appeals. Therefore, a decision in this case is necessary to prevent confusion in the administration of Section 22(k) by the courts. The Court of Appeals in the instant case held: (a) Section 22(k) can apply before the date upon which a taxpayer is divorced, and (b) Section 22(k) can apply before an obligation is imposed upon or incurred by the divorced husband. A review of other decisions reveals the conflict which must be resolved by this Court.

The following cases stand for the proposition that payments made under separation agreements *prior* to a judicial decree of divorce or of separate maintenance are not deductible by the husband and not includible in the income of the wife:

Joseph C. Brightbill, T. C. Memo, Feb. 4, 1949, Docket No. 15010, affirmed without opinion, 178 F. (2d) 404 (C. A. 3).

Daine v. *Commissioner,* 168 F. (2d) 449 (C. A. 2).

Joseph D. Fox, 14 T. C. 1131.

Joseph A. Fields, 14 T. C. 1202, pending before C. A. 2nd.

Bertram Levy, T. C. Memo, May 12, 1948, Docket No. 13440.

Robert Barry, T. C. Memo, Feb. 10, 1948, Docket No. 12680.

Abraham L. Berman, T. C. Memo, Dec. 24, 1947, Docket No. 12335.

Payments made under separation agreements *without* a decree of divorce or separate maintenance are also not within Section 22(k):

Terrel v. *Commissioner,* 179 F. (2d) 838 (C. A. 7), cert. denied 10-9-50.

Smith v. *Commissioner,* 168 F. (2d) 446 (C. A. 2).

Charles L. Brown, 7 T. C. 715.

Cohan v. *Commissioner,* T. C. Memo, March 12, 1951, Docket No. 23174.

Isidore Goodman, T. C. Memo, June 1, 1949, Docket No. 16060.

Angelo Frascone, T. C. Memo, March 25, 1949, Docket No. 19455.

Bernarr MacFadden, T. C. Memo, March 19, 1948, Docket No. 13717.

Harold W. Hoyt, T. C. Memo, Feb. 27, 1948, Docket No. 13905.

Payments made *prior* to a decree of divorce or legal separation, or *in the absence* of a legal divorce or separation are not within Section 22(k):

George D. Wick, 7 T. C. 723, affirmed without opinion, 161 F. (2d) 732 (C. A. 3).

Frank J. Kalchthaler, 7 T. C. 625.

Further, a *legal obligation* must be imposed or incurred by the husband because of the family or marital relation before Section 22(k) will apply:

Van Vlaanderen v. *Commissioner,* 175 F. (2d) 389 (C. A. 3).

Ben Myerson, 10 T. C. 729.

The Court of Appeals in the instant case rested its decision on the fact that the property settlement agreement itemized the obligation more fully than did the decree. But in doing so, it completely ignored the requirements of

the statute and the cases cited above. The Court did not demonstrate that an obligation was imposed upon petitioner's husband on February 27, 1935. The Court did not reconcile its decision with the statutory requirement that the wife must be divorced under a decree of divorce before Section 22(k) can apply.

The above factors sharply differentiate this case from *Mahana* v. *U. S.*, 88 F. Supp. 285, cert. denied 6-5-50, and *Terrel* v. *Commissioner*, 179 F. (2d) 838 (C. A. 7), cert. denied 10-9-50. In those cases the lower courts were in complete harmony with the great body of law interpreting Section 22(k). In the *Terrel* case, by denying certiorari, the Court did not disturb the following statement by this same Court of Appeals:

"The mere fact that a court enters a decree or judgment is not sufficient to bring the case under Section 22(k); *there must be a decree of divorce or of separate maintenance in order to comply with Section 22(k).*" (Emphasis supplied.) (179 F. (2d) 838, 841.) There, no confusion resulted from a denial of certiorari. In the instant case, the overlooking of statutory requirements and the disregard of standards evolved by the Tax Court and other Courts of Appeals would leave in doubt the correct basis upon which to apply Section 22(k). The Tax Court would be forced to look to *two* standards when applying Section 22(k). The confusion in such a situation is evident.

The importance of this case to the public in general cannot be over emphasized. In 1948 alone there were 408,000 divorces in the United States.[5] It can be assumed that in a great percentage of these cases alimony was provided either through periodic payments or installment payments

5. Vital Statistics of the United States, Part I, Page XLVII, National Office of Vital Statistics, Public Health Service, Federal Security Agency. Unofficial statistics for 1949 and 1950 are 397,000 and 385,000, respectively.

on a lump sum property settlement. The tax consequences of such provisions are of utmost interest to the parties involved.[6] No intelligent planning for post-marital support can be accomplished without ascertaining upon which person income tax liability for support payments will fall. The decision in the instant case, if allowed to stand, will reduce any planning in this respect to the status of mere guesswork.

II.

The Court below, in the instant case, has applied Section 22(k) in a manner clearly at variance with the language of the statute.

The three requirements of Section 22(k) must all be met before it will apply to support payments:

> (a) The wife must be "divorced or legally separated from her husband under a decree of divorce or of separate maintenance;"
>
> (b) The payments in question must be "received subsequent to such decree;" and
>
> (c) The payments must be "in discharge of * * * a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by such husband under such decree or under a written instrument incident to such divorce."

Installment payments discharging a part of an obligation certain in terms of money or property are not taxable to the wife unless the "principal sum, by the terms of the decree or instrument, may be or is to be paid within a period ending more than 10 years from the date of such decree or instrument."

The Court of Appeals erroneously held that Section 22(k) was operative before requirements (a) and (c) above

6. There are presently 23 cases on the Tax Court docket alone which involve Section 22(k). (CCH Tax Court Reporter, page 6903.)

were fulfilled. On February 27, 1935 petitioner was not divorced. On that date no legal obligation was yet imposed upon or incurred by petitioner's husband.

This Court has not yet passed on the question of whether Section 22(k) is operative before a wife is divorced and before an obligation is imposed upon or incurred by the husband. It is submitted that these questions are important for the proper administration of the federal income tax laws and that the decision of the Court below was erroneous and in conflict with the clear words of the statute.

III.

The Court of Appeals has decided the instant case in a way clearly in conflict with *Harris* v. *Commissioner,* 340 U. S. 106, which decision is applicable to this case. The *Harris* case established that where, by the terms of a property settlement agreement, its operation is conditioned in any manner upon the entry of a divorce decree, then the decree and not the agreement creates and fixes the rights and obligations of the parties and affects a transfer between the spouses. *McMurtry* v. *Commissioner*, 16 T. C. No. 23, promulgated January 24, 1951. The Court below, unable to distinguish the *Harris* case, cast it aside as inapplicable. But this Court in the *Harris* case was not discussing a statutory standard as to when rights accrue to parties in a gift tax situation, but rather a general rule of law as to when an obligation is imposed. The event upon which financial rights accrue to a party for gift tax purposes should not be different from that for the purposes of Section 22(k). The pronouncement of this Court in *Harris* would lose its meaning if it is so held in this case. If the event is different (which we assert is incorrect), the Court below did not explain the difference adequately. The

settlement agreement and the decree in the two cases are almost exactly alike. If this Court thinks *Harris* should be limited to gift tax cases, tax and divorce practitioners should be informed of any basis for distinction. To beg the question, as the Court below did, will serve only to confuse the bar.

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the United States Court of Appeals for the Seventh Circuit, commanding said Court to certify and send this Court a full and complete transcript of the record and of the proceedings of the said United States Court of Appeals for the Seventh Circuit had in the case numbered and entitled on its docket, No. 10078, *Commissioner of Internal Revenue, Petitioner* v. *Tillie Blum, Respondent,* to the end that this cause may be reviewed and determined by this Court as provided for by the Statutes of the United States; and that the judgment herein of said United States Court of Appeals for the Seventh Circuit be reversed by this Court, and for such further relief as to this Court may seem proper.

Respectfully submitted,

GEORGE L. WEISBARD,
Counsel for Petitioner.

Dated: June, 1951.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

OPINION BELOW.

The opinion of the United States Court of Appeals for the Seventh Circuit (R. 75-80) is reported in 187 F. (2d) 177. The opinion of the Tax Court of the United States (R. 55-60) is reported in 10 T. C. 1131.

JURISDICTION.

The judgment to be reviewed was entered February 9, 1951. A timely petition for rehearing was denied on March 21, 1951. The jurisdiction of this Court is invoked under Title 28 of the United States Code, Section 1254(1).

STATEMENT OF THE CASE.

The case has already been stated in the preceding petition at pp. 2-5, which statement, by reference thereto, is made a part of this brief, with the same force and effect as if fully set forth herein.

ARGUMENT.

A.

Section 22(k) Does Not Apply to a Wife Until She Is Divorced by the Entry of a Decree.

Section 22(k) expressly states that it applies only "in the case of a wife who is divorced * * * from her husband under a decree of divorce * * *." The same statement may be found in House Report No. 2333, 77th Congress, 2nd Session, page 72 and Senate Report No. 1631, 77th Congress, 2nd Session, page 83. The Court of Appeals for the Second Circuit in *Smith* v. *Commissioner,* 168 F. (2d) 446, and the Tax Court in *Charles L. Brown,* 7 T. C. 715, both have held that a wife does not come within the class described in Section 22(k) until there is a legal separation under a decree of divorce or of separate maintenance. See also cases compiled on pages 7 and 8, *supra.*

The respondent contended in the Tax Court that petitioner was divorced before the decree was entered on March 2, 1935. A recent Illinois decision has removed that question from the realm of dispute. In *Freeport Motor Casualty Co.* v. *Tharp,* 406 Ill. 295, 298, 94 N. E. (2d) 139, 141 (May 18, 1950), the Illinois Supreme Court said:

> "Under our practice there is a distinction between a *judgment* at law and a *decree* in chancery. In chancery the whole matter is completely under the control of the chancellor until the final decree has been filed or recorded. Until that time, he may alter, amend, change, or even disregard all he has said in his minutes; he may reverse his announcement or may order a rehearing on his own motion, at any time before he has passed the decree and it has been filed for record, or it has been spread upon the record. After this is done, the whole matter is beyond his control. Then,

and not until then, it is the decree of the Court and is *res judicata.*"[1]

The Court of Appeals for the Seventh Circuit erroneously held in *Harry Blum* v. *Commissioner,* 177 F. (2d) 670, that a decree can become effective in Illinois before it is entered.[2] Since its opinion in the instant case does not repeat that fallacy[3] (the question was thoroughly argued orally and on brief) it is proper to assume that the doctrine of the *Freeport* case has been fully accepted by the Court of Appeals.[4] Thus, according to Illinois law, petitioner was not divorced until the entry of the decree on March 2, 1935.

Congressional intent was completely disregarded by the Court below in elevating the word "instrument" as used in Section 22(k) to a position of determining when the ten-year period begins to run in a case where the decree *first* imposes the obligation. The word "instrument" was included in the statute to provide equality of treatment between residents of different states. In some states (such

1. See *Moore* v. *Shook,* 276 Ill. 47, 114 N. E. 592, for an interesting application of this rule. See also *Hughs* v. *Washington,* 65 Ill. 245, 249; *Horn* v. *Metzger,* 234 Ill. 240, 244, 84 N. E. 893. It is not even necessary that a decree be signed by the chancellor; its entry on the record by the clerk gives it validity. *Horn* v. *Horn,* 234 Ill. 268, 274, 84 N. E. 904.

2. The importance for federal tax purposes of the entry date of a decree is emphasized in *Daine* v. *Commissioner,* 168 F. (2d) 449 (C. A. 2) and *Van Vlaanderen* v. *Commissioner,* 175 F. (2d) 389 (C. A. 3). In those cases alimony payments made without a decree were held not deductible by the husband notwithstanding a subsequent order *nunc pro tunc.*

3. The Court below based its pronouncement in *Harry Blum* on *People* v. *Jarecki,* 352 Ill. 207, 185 N. E. 570, 571, which case was not in point because it dealt with a *judgment* at law.

4. Moreover, it should be noted that petitioner's cross bill for divorce was filed on March 1, 1935 (R. 55). Thus, any argument that the divorce decree was effective before that date must fail for the simple reason that petitioner had filed no pleading upon which to base such decree. *Warner* v. *Mettler,* 260 Ill. 416, 422, 103 N. E. 259; *Risser* v. *Ayers,* 294 Ill. 241, 244, 128 N. E. 389.

as Pennsylvania) there is no legal obligation of support after the dissolution of marriage by an absolute divorce. Hence, such obligation can be created only by an instrument incident to such divorce. The Senate Committee on Finance said concerning Section 22(k):

> "In addition the amended sections will produce uniformity in treatment of amounts paid in the nature of or in lieu of alimony regardless of variance in the laws of different States concerning the existence and continuance of the obligation to pay alimony."

(Senate Report No. 1631, 77th Congress, 2nd Session, page 83; House Report No. 2333, 77th Congress, 2nd Session, page 72.)

A careful reading of the subsection discloses that every time the phrase "decree or instrument" appears, the term "decree" is always first. This sequential order of the documents is not without significance. In effect, the statute says, "If the decree specifies alimony, stop there; but if the decree is silent on alimony, then refer to the instrument." That the term "or instrument" was inserted in the subsection to provide for situations in which the decree is silent on alimony is obvious from an analysis of *Tuckie G. Hesse,* 7 T. C. 700, and *Cox* v. *Commissioner,* 176 F. (2d) 226 (C. A. 3).[5]

The secondary role of "instrument" is manifest from the statutory requirement that payments, to be taxable, must be received subsequent to the decree. Thus, payments made after the instrument but before the decree (or without a decree) are not taxable to the recipient. *Charles L. Brown,* 7 T. C. 715, *George D. Wick,* 7 T. C. 723, aff'd.

5. The explanatory role of "instrument" in this case is emphasized by the law of the State of Illinois. When an agreement covering alimony is incorporated in an Illinois divorce decree, the agreement becomes merged in the decree. *Adler* v. *Adler,* 373 Ill. 361, 26 N. E. (2d) 504; *Miller* v. *Miller,* 317 Ill. App. 447, 46 N. E. (2d) 102; *Cahill* v. *Cahill,* 316 Ill. App. 325, 45 N. E. (2d) 69.

without opinion, 161 F. (2d) 732 (C. A. 3). In the absence of a decree Section 22(k) is wholly inoperative. *Smith* v. *Commissioner,* 168 F. (2d) 446 (C. A. 2); *Abraham L. Berman,* T. C. Memo, December 24, 1947, Docket 12335. Amendatory agreements without approval of the divorce court have been held ineffectual for tax purposes. *Daine* v. *Commissioner,* 168 F. (2d) 449 (C. A. 2); *Van Vlaanderen* v. *Commissioner,* 175 F. (2d) 389 (C. A. 3).

The meaning of "instrument" in Section 22(k) is stretched beyond Congressional intent if it is claimed that the date of an instrument incident to the divorce determines when Section 22(k) shall apply. The first sentence in the subsection settled that issue: Section 22(k) shall apply "in the case of a wife who is divorced * * * from her husband under a decree of divorce". It is submitted that the Court below erred when it held the conditional property settlement agreement (which imposed no obligation upon the parties until the entry of the divorce decree) is paramount to the divorce decree in determining when Section 22(k) applied to petitioner.

B.

The Court Below Erred When It Held the Obligation to Pay Installments Is Imposed by a Conditional Property Settlement Agreement Before the Entry of a Decree of Divorce. The Court Below Should Have Followed the Harris Rule.

The Tax Court in *McMurtry* v. *Commissioner,* 16 T. C. No. 23, entered January 24, 1951, citing the *Harris* case, aptly said:

> "It is also established that where by the terms of the property settlement agreement its operation is conditioned in any manner upon entry of a divorce decree, then the decree and not the agreement creates and

fixes the rights and obligations of the parties and effects the transfer of property between the spouses."

This interpretation by the Tax Court of *Harris* v. *Commissioner,* 340 U. S. 106, and *Commissioner* v. *Maresi,* 156 F. (2d) 929, is obviously accurate and hence is urged upon this Court. The Court below rejected *Harris* as having "no proper application to the cause under review." The opinion of the Court below rests on the statement that "the provisions of the agreement which are to be performed and carried out are not explicitly set down in the decree." The Court below ignores the statement in the decree that the "property settlement contract, by reference thereto, is made a part of this decree, with the same force and effect as if fully set out herein. * * *" Incorporation by reference is a common method of adoption and approval of conditional property settlement agreements. By the incorporation the chancery court puts its sanctions behind all of the terms of the conditional property settlement agreement. This was done in the *Harris* case. It was there held that the decree—and not the property settlement agreement—was the source of the financial rights of the spouses.[6]

It is very important for this Court to signify that although *Harris* was a gift tax case its principle is equally valid in income taxation where the opportunities for application are far more numerous. The soundness of the *Harris* doctrine is manifest when applied to a Section 22(k) situation. (See example in Petition for Rehearing, Record pp. 88-89.) A different rule for gift tax and income tax cases should be explained on the basis of some coherent principle of law rather than taken as self-evident.[7]

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6. The *Harris* case went further and affirmed this principle even where the post-nuptial settlement agreement also provided that its covenants should survive the divorce decree. Here no question of survival is involved.

7. The central question for the Court below was a determination of when an obligation was imposed upon or incurred by

C.

The Court Below Erred When It Held the Obligation to Pay Rested Upon the Contract, Whereas the Contract, by Its Own Terms, Was Not Effective Until the Entry of a Decree. The Court Below Should Have Held Section 22(k) Did Not Apply to Petitioner Before an Obligation Was Imposed on March 2, 1935 by the Entry of the Decree.

Even if this Court should attach any importance to the word "instrument" of Section 22(k) in a case such as this when an obligation is imposed by the decree, the problem of *when* the instrument became effective must still be solved. This problem was answered on the face of the settlement agreement. Its language was clear:

> "This agreement is expressly declared by both parties *to be effective* only in the event that said Superior Court * * * shall *enter* a decree of divorce * * *. In the event that the said court * * * shall not *enter* a decree of divorce * * * this agreement shall become and be *null and void.*" (R. 15.) (Emphasis supplied.)

By its terms the property settlement agreement imposed no obligation upon the parties until the entry of the decree. That entry was on March 2, 1935. The instrument merely blueprinted the proposed rights that were to be created by the decree. The parties to the contract clearly intended to be bound by its terms only in the event a decree of divorce was entered. Until the entry of the decree on March 2, 1935 the condition precedent for the legal enforcement of the contract was lacking. Harry Blum was under no obligation to pay petitioner until March 2, 1935. Had the par-

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petitioner's husband. The Court below was precluded from following the main rationale of its decision in the *Harry Blum* case because of the subsequent decision by the Illinois Supreme Court in the *Freeport* case. The alternative rationale for its decision in *Harry Blum* could only be followed if the *Harris* case were ignored.

ties reconciled and petitioner abandoned her suit, Harry Blum would have had no obligation under the contract of February 27, 1935. The Tax Court recognized this in its opinion. It stated:

> "Here the obligation was imposed by a combination of the instrument and the entered decree which made it effective the first time. Thus, the date of the beginning of the period was March 2, 1935." (R. 60.)

The Tax Court in effect held that Section 22(k) takes into purview only "Installment payments discharging a part of an *obligation* * * *." (Emphasis supplied.) The Court of Appeals erred in holding the ten-year period under Section 22(k) can begin running before an obligation is imposed upon the divorced husband.

Conclusion.

It has been demonstrated that installment payments of a lump sum do not come within the ambit of Section 22(k) until the entry of a decree severing the marital relationship and imposing an obligation to pay the lump sum. The United States Court of Appeals for the Seventh Circuit erred by not so holding.

Thus, payments received by petitioner in 1942, 1943 and 1944 from her divorced husband were installments of a principal sum which, by the terms of the decree, were required to be paid within a period ending *not* more than ten years from the date of the decree; hence were not "periodic payments" under Section 22(k) and therefore, are free of tax.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers by granting a writ of certiorari and thereafter reviewing and reversing said decision.

Respectfully submitted,

GEORGE L. WEISBARD,

Counsel for Petitioner.

June, 1951.

APPENDIX.

Internal Revenue Code:

Sec. 22. GROSS INCOME.

(k) (as added by the Revenue Act of 1942, c. 619, 56 Stat. 798, Sec. 120(a)) Alimony, etc. Income.—In the case of a wife who is divorced or legally separated from her husband under a decree of divorce or of separate maintenance, periodic payments (whether or not made at regular intervals) received subsequent to such decree in discharge of, or attributable to property transferred (in trust or otherwise) in discharge of, a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by such husband under such decree or under a written instrument incident to such divorce or separation shall be includible in the gross income of such wife, and such amounts received as are attributable to property so transferred shall not be includible in the gross income of such husband. This subsection shall not apply to that part of any such periodic payment which the terms of the decree or written instrument fix, in terms of an amount of money or a portion of the payment, as a sum which is payable for the support of minor children of such husband. In case any such periodic payment is less than the amount specified in the decree or written instrument, for the purpose of applying the preceding sentence, such payment, to the extent of such sum payable for support, shall be considered a payment for such support. Installment payments discharging a part of an obligation the principal sum of which is, in terms of money or property, specified in the decree or instrument shall not be considered periodic payments for the purposes of this subsection; except that an installment payment shall be considered a periodic payment for the purposes of this subsection if such principal sum, by the terms of the decree or instru-

ment, may be or is to be paid within a period ending more than 10 years from the date of such decree or instrument, but only to the extent that such installment payment for the taxable year of the wife (or if more than one such installment payment for such taxable year is received during such taxable year, the aggregate of such installment payments) does not exceed 10 per centum of such principal sum. For the purposes of the preceding sentence, the portion of a payment of the principal sum which is allocable to a period after the taxable year of the wife in which it is received shall be considered an installment payment for the taxable year in which it is received.

* * * * *

In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 101

TILLIE BLUM, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings of fact and opinion of the Tax Court (R. 55-60) are reported at 10 T.C. 1131. The opinion of the Court of Appeals (R. 75-80) is reported at 187 F. 2d 177.

JURISDICTION

The judgment of the Court of Appeals was entered on February 9, 1951 (R. 81). A petition for rehearing (R. 83-94) was filed on March 6,

1951, and was denied on March 21, 1951 (R. 95). The petition for a writ of certiorari was filed on June 7, 1951. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

QUESTION PRESENTED

The taxpayer and her husband entered into a written agreement on February 27, 1935, incident to a pending divorce action. The agreement provided that the husband should pay $120,000 to the taxpayer in stipulated annual installments, with the final installment to be paid on March 1, 1945. A divorce decree, which approved this agreement, was signed by the judge on February 28, 1935, and was entered of record on March 2, 1935.

Section 22(k), Internal Revenue Code, provides that installment payments of a lump sum alimony obligation are taxable to the wife if payable within a period ending more than 10 years from the date of the divorce decree or of a written instrument incident to the divorce.

The question is whether the Court of Appeals erred in holding that the installment payments here were taxable to the taxpayer since they were payable within a period of more than 10 years, as described in Section 22(k).

STATUTE INVOLVED

The pertinent provisions of the statute involved are set forth in the Appendix, *infra*.

STATEMENT

This case involves an asserted deficiency in personal income taxes for the calendar years 1942-1944, inclusive. A portion of the facts was stipulated (R. 12-37), and a portion was adduced by testimony (R. 39-54). The material facts may be summarized as follows:

Harry Blum, who had been married to the taxpayer since 1914, started an action for divorce in 1932 in Cook County, Illinois. The taxpayer filed an answer and a cross-bill in January, 1933, asking for separate maintenance. She filed an amendment to her cross-bill in 1935 in which she asked for a divorce, instead of separate maintenance. (R. 55.)

On February 27, 1935, the taxpayer and Harry Blum entered into a written agreement which was incident to the pending divorce action. (R. 12, 14-21, 55.) This agreement recited that the wife had filed her amended cross-bill seeking a divorce on February 27, 1935 (R. 15). After providing that it was to be effective only in the event that a decree of divorce should be granted (R. 15-16), the agreement specified, among other things, that Harry Blum was to pay to the taxpayer the sum of $120,000, payment to be made by nine annual installments of $7,500 beginning on March 1, 1936, and with a final installment of $52,500 to be paid on or before March 1, 1945 (R. 16). The agreement also provided that the husband was to pay interest at the rate of five percent on the $120,000

and any balance remaining unpaid. The payments to the taxpayer were to continue regardless of the death of either party, and regardless of the remarriage of the taxpayer. Harry Blum was to pledge security for the payment of the $120,000. The agreement was to be made a part of the decree of divorce. (R. 56.)

A divorce was granted to the taxpayer on her amended cross-bill. The uncontradicted testimony of the attorney who had represented Harry Blum in the divorce action was that the decree was signed by the divorce judge in his chambers on February 28, 1935. (R. 49-53.) The divorce decree was entered of record on March 2, 1935. (R. 56.) The decree referred to the written agreement of February 27, incorporated it by reference, and ordered the parties to carry out its terms. (R. 25, 56.)

Harry Blum paid to the taxpayer the $120,000, together with interest, in varying annual payments, a final payment of $33,000 being made on March 1, 1945. (R. 13, 56.) During the taxable years 1942-1944, inclusive, he paid her the respective amounts of $13,000; $8,000; $12,000, exclusive of interest. (R. 56.) The Commissioner determined deficiencies in her tax returns on the ground that these amounts were includible in her taxable income under Section 22(k), Internal Revenue Code. (R. 57.) The Tax Court refused to sustain the Commissioner's deficiency determinations. (R. 58-60.) The Court of Appeals (which had previously re-

versed the Tax Court and had held that the amounts here in controversy were deductible by the husband (*Harry Blum* v. *Commissioner*, 177 F. 2d 670)) reversed the Tax Court and held that these amounts were taxable to the wife. (R. 75-80.)

ARGUMENT

Sections 22(k) and 23(u), Internal Revenue Code (Appendix, *infra*), provide a statutory pattern for taxing certain alimony payments to the divorced wife rather than to her former husband. Section 22(k) provides that, where the wife has been divorced under a decree of divorce, periodic payments subsequently made to her in discharge of a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by the husband under the divorce decree or under a written instrument incident to the divorce, shall be includible in the gross income of the wife. Section 23(u) provides that the husband, in computing his net income, may deduct the payments made to the wife which are includible in her income under Section 22(k).

In defining the kind of periodic payments which are taxable to the wife, Section 22(k) makes an exception with respect to a principal sum which is payable in installments—these are not considered as periodic payments which are includible in the wife's income. However, Section 22(k) expressly provides that such installment payments shall be considered as periodic payments (and therefore

taxable to the wife) if the principal sum "by the terms of the decree or instrument, may be or is to be paid within a period ending more than 10 years from the date of such decree or instrument * * *."

The controversy below turned on the applicability of the above-quoted portion of the statute:—namely, were the installments of the principal sum involved here payable within a period ending more than 10 years from the date of the decree or written instrument incident to the divorce and, accordingly, taxable to the wife as periodic payments under Section 22(k). There can be no question that Section 22(k) is applicable in all other respects since the parties were divorced under a decree of divorce, the payments were received by the taxpayer wife subsequent to the decree, and the payments were in discharge of a legal obligation which, because of the marital relationship, was incurred by the husband under a decree of divorce or under a written instrument incident to the divorce.[1]

On the narrow question presented to it, the court

[1] Since this case did not involve payments made before the date of the decree or before an obligation was imposed on the husband, the taxpayer is plainly wrong in asserting that the court below held that Section 22 (k) can apply before the date on which the wife is divorced and that it can apply before the husband incurs any obligation under the decree or written instrument. (Pet. 7, 10-11.) That the court below is fully cognizant of the necessity of a decree of divorce under Section 22 (k) is evident from its decision in *Terrell* v. *Commissioner*, 179 F. 2d 838 (C.A. 7th), certiorari denied, 340 U.S. 822. The taxpayer's discussion of these particular requirements of Section 22 (k), which occupies a considerable portion of the petition, but which is extraneous to this case (Pet. 7-11, Br. 14-17), does not require further comment.

below held that the payments in question were taxable to the wife as periodic payments within the purview of Section 22(k), since the written instrument incident to the divorce was dated February 27, 1935, and since the installments could be and were paid within a period ending more than 10 years from the date of the instrument, namely, on March 1, 1945. Its decision is in harmony with its earlier decision in *Harry Blum* v. *Commissioner,* 177 F. 2d 670 (C.A. 7th), where, in reversing the Tax Court, it was held that the very payments which are here in question were not taxable to the taxpayer's former husband.

There are no conflicting decisions requiring resolution by this Court. *Harris* v. *Commissioner,* 340 U.S. 106, which the taxpayer claims is opposed to the decision below (Pet. 11-12, Br. 18), involved different statutory provisions and totally different problems. As the court below said (R. 80): "the *Harris* case has no proper application to the cause here under review." *Harris* was a gift tax case involving a post-nuptial property settlement agreement (as distinguished from an agreement respecting alimony) which was approved in a divorce decree. The question was whether the payments were taxable as gifts because not made for an adequate and full consideration in money or money's worth. This Court concluded that the payments were made pursuant to the divorce decree rather than under the written instrument, in the particular circum-

stances of that case, and that Congress did not intend to tax such transfers as gifts.

The selection of the spouse who should bear the burden of the income tax on alimony payments is patently different from the question of the *Harris* case whether a gift tax is to be imposed at all on transfers which represent an unraveling of the spouses' property interests. Congressional intent with respect to the latter has little to do with the former, particularly since Congress had made it crystal clear that the income tax must be paid by someone, for if the alimony payments are not taxable to the wife, no deduction is available to the husband. Moreover, in the *Harris* case the gift tax liability turned on whether the transfers were made pursuant to the agreement of the parties or pursuant to the divorce decree. The income tax liability of a wife under Section 22(k), however, is not dependent on such a distinction, for that section applies with equal force to payments made pursuant to a divorce decree or pursuant to a written instrument incident to the divorce. Thus, what was a crucial distinction in *Harris* is a matter of indifference under Section 22(k). Furthermore, on the narrow question presented by this case, namely, what is the starting point for measuring the arbitrary 10 year period by which Congress described those periodic installment payments of alimony which are to be taxed to the wife, Section 22 (k) sets forth its own standard. Since that section

expressly provides that the 10 year period is to begin either from the date of the decree or from the date of the written instrument, the *Harris* case has no controlling significance in determining when Congress intended the period should start its measurement.

The taxpayer, accordingly, is plainly mistaken in asserting a conflict between the decision below and *Harris* v. *Commissioner,* 340 U.S. 106, as a basis for invoking the granting of certiorari. There are, moreover, no other decisions which can be regarded as in conflict with the lower court's application of Section 22(k).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

PHILIP B. PERLMAN,
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Assistant Attorney General.
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JULY, 1951.

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APPENDIX

Internal Revenue Code:

SEC. 22. GROSS INCOME.

* * * * *

(k) [as added by Section 120(a) of the Revenue Act of 1942, c. 619, 56 Stat. 798] *Alimony, etc., Income.*—In the case of a wife who is divorced or legally separated from her husband under a decree of divorce or of separate maintenance, periodic payments (whether or not made at regular intervals) received subsequent to such decree in discharge of, or attributable to property transferred (in trust or otherwise) in discharge of, a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by such husband under such decree or under a written instrument incident to such divorce or separation shall be includible in the gross income of such wife, and such amounts received as are attributable to property so transferred shall not be includible in the gross income of such husband. * * * Installment payments discharging a part of an obligation the principal sum of which is, in terms of money or property, specified in the decree or instrument shall not be considered periodic payments for the purposes of this subsection; except that an installment payment shall be considered a periodic payment for the purposes of this subsection if such principal sum, by the terms of the decree or instrument, may be or is to be paid within a period ending more than 10 years

from the date of such decree or instrument, but only to the extent that such installment payment for the taxable year of the wife (or if more than one such installment payment for such taxable year is received during such taxable year, the aggregate of such installment payments) does not exceed 10 per centum of such principal sum. For the purposes of the preceding sentence, the portion of a payment of the principal sum which is allocable to a period after the taxable year of the wife in which it is received shall be considered an installment payment for the taxable year in which it is received. * * *

* * * * *

(26 U.S.C. 1946 ed., Sec. 22.)

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * *

(u) [as added by Section 120(b) of the Revenue Act of 1942, *supra*] *Alimony, Etc., Payments.*—In the case of a husband described in section 22(k), amounts includible under section 22(k) in the gross income of his wife, payment of which is made within the husband's taxable year. If the amount of any such payment is, under section 22(k) or section 171, stated to be not includible in such husband's gross income, no deduction shall be allowed

with respect to such payment under this subsection.

* * * * *

(26 U.S.C. 1946 ed., Sec. 23.)

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